Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 2001

PETER PAUL MITRANO,

Petitioner,

versus

VIRGINIA LEE KELLY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Vermont

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65pp

Question Presented for Review

1. Should the State of Vermont be required to enforce a child custody order (from the Commonwealth of Virginia dated 1992) pursuant to Title 28, United States Code, Section 1738A?

2. Should the Supreme Court of the State of Vermont be allowed to access attorney's fees related to the trial court against the petitioner for a reason raised for the first time before the Supreme Court of the State of Vermont in view of the common law American rule that each party shall pay their own attorney's fees?

3. Should the Supreme Court of the State of Vermont have ruled on the Motion to Strike filed by the petitioner?

Parties to the Proceeding

The caption of this case in this Supreme Court of the United States contains the names of all parties before the Supreme Court of the State of Vermont. Neither party is a parent, subsidiary or affiliate of any company.

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Supreme Court of the United States

October Term, 2001

PETER PAUL MITRANO,
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versus

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Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Vermont

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Opinion Below

The decision of the Supreme Court of the State of Vermont from which petitioner seeks certiorari appears in the Appendix hereto at page A-1. The Judgment Order of the trial court, the Vermont Family Court, Windsor County, also appears in the Appendix hereto at page A-12.

Jurisdiction

The decision of the Supreme Court of the State of Vermont was entered on August 29, 2001. This petition for writ of certiorari was filed within ninety days of said date of August 29, 2001. This Court's jurisdiction is invoked under 28 U.S.C., § 1257(a).

Statement of the Case

This petition for writ of certiorari arises from the filing on January 9, 2001 of an Emergency Petition for Enforcement of a Custody Order that was filed by the petitioner, Peter Paul Mitrano (hereinafter sometimes referred to as the "father"). The action was dismissed by the trial court for failing to state a claim on the basis of a 12(b)(6) ruling. The Supreme Court of the State of Vermont affirmed said dismissal. The father claims that he is entitled to the custody of the parties' minor children pursuant to the custody order (from the Commonwealth of Virginia dated 1992) pursuant to Title 28, United States Code, Section 1738A. The respondent, Virginia Lee Kelly (hereinafter sometimes referred to as the "mother") claims that she is entitled to the custody of the parties' minor children despite said custody order.

The mother has denied the father access to even see his three children since January 5, 2001. The relevant facts are that the Commonwealth of Virginia entered a fully-litigated custody order stating "that the minor children of the parties shall reside primarily with" the father in compliance with Title 28, United States Code, Section 1738A on September 4, 1992. Between September 4, 1992 and October 1, 2000, there has not been any litigation between the mother and the father over the custody of said minor children. Since at least September 4, 1992 until at least October 1, 2000, the minor children of the parties have resided primarily with the father.

Beginning since at least October 6, 2000, the children have lived with their mother in the State of Vermont from at least 6:00 P.M. on Friday, October 6, 2000 until school started at approximately 8:00 A.M. on Monday, October 9, 2000 and from 6:00 P.M. on Friday, October 13, 2000 until school started at approximately 8:00 A.M. on Monday, October 16, 2000. Accordingly, when the mother filed a petition to modify a custody order in the State of New Hampshire on October 16, 2000 (and prior thereto), the children were living in both the State of Vermont and the State of New Hampshire.

The custody Order of the Circuit Court of Fairfax County, Virginia states in part that the parties "shall have joint physical and legal custody of their minor children". Thus, while the mother was exercising her joint physical and legal custody of their minor children and living in the State of Vermont, said minor children were living in the State of Vermont. Because the mother was living with the three children of the parties in the State of Vermont in October 2000 prior to the filing by the mother of her Ex Parte Petition to Bring Cause Forward and Modify on October 16, 2000, the State of New Hampshire was not a "home State" as defined by Title 28 of the United States Code, Section 1738A(b)(4) on October 16, 2000. Accordingly, it is clear that the State of New Hampshire was not a "home State" of the children "on the date of the commencement of the proceeding". *Also see* Title 28 of the United States Code, Section 1738A(c)(2)(A)(i). Title 28 of the United States Code, Section 1738A(c)(2)(A) states that:

> "(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;"

The father left the State of New Hampshire by the end of day of December 20, 2000. There was no contestant[1] living in the State of New Hampshire at the end of day of December 20, 2000. Their daughter, Christina, had been unlawfully living with her mother in the State of Vermont. Their sons, Peter and Christopher, were living in the Commonwealth of Virginia with their father until the mother unlawfully took said boys from the Commonwealth of Virginia to the State of Vermont under her right of visitation and failed to return said boys according to the custody Order of the Circuit Court of Fairfax County, Virginia. Accordingly, after December 20, 2000, the State of New Hampshire no longer could even be considered a "home State" to pursuant Title 28 of the United States Code, Section 1738A(c)(2)(A)(ii) because no one was left in the State of New Hampshire.

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1. A "contestant" is defined as "a person, including a parent or grandparent, who claims a right to custody or visitation of a child".

Any orders issued by the State of New Hampshire after December 20, 2000 are clearly void for lack of subject matter jurisdiction. Title 28 of the United States Code, Section 1738A(c)(2)(A)(ii) requires that **"a contestant continues to live in such State"**. It is clear that no contestant continued to live in the State of New Hampshire after December 20, 2000 until at least the end of January 2001.

In paragraph numbered 2 of the Emergency Petition for Enforcement of the Attached Custody Order, the father stated in part that:[2]

> ". . . The respondent, Virginia Lee Kelly, resides at Newton Lane, Norwich, Vermont 05055. The respondent, Virginia Lee Kelly, receives mail at the address of Post Office Box 1248, Norwich, Vermont 05055."

In her Motion to Dismiss and for Attorney's Fees, the mother did not deny the above-quoted language.

In paragraph numbered 6 of the Emergency Petition for Enforcement of the Attached Custody Order, the father stated that:

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2. The father contends that all facts stated in his Emergency Petition for Enforcement of the Attached Custody Order are deemed true for the purpose of deciding whether the motion to dismiss should have granted; even so, as a protective measure and out of an abundance of caution, the father notes that these facts were not contested by the mother.

> ". . . Since October 6, 2000, the children have lived with the respondent in the State of Vermont from at least 6:00 P.M. on Friday, October 6, 2000 until school started at approximately 8:00 A.M. on Monday, October 9, 2000 and from 6:00 P.M. on Friday, October 13, 2000 until school started at approximately 8:00 A.M. on Monday, October 16, 2000. Accordingly, prior to the date of a filing of petition to modify a custody order in the State of New Hampshire which was October 16, 2000 and on October 16, 2000, the children were living in both the State of Vermont and the State of New Hampshire . . . ."

In her Motion to Dismiss and for Attorney's Fees filed before the trial court, the mother did not deny the above-quoted language.

Moreover, some of the more critical facts stated by the father in his Emergency Petition for Enforcement of the Attached Custody Order that are deemed to be true are as follows:

> "5. . . . After the petitioner produced Peter Paul Mitrano (age 14) and Christopher Louis Mitrano (age 9) for visitation in Fairfax, Virginia, the respondent failed to return the children to petitioner in accordance with the attached custody Order of

the Circuit Court of Fairfax County, Virginia . . .

"6. **The petitioner denies that the State of New Hampshire has jurisdiction to determine custody of said children pursuant to Title 28 of the United States Code, Section 1738A.** Petitioner further states that as of the end of the day of December 20, 2000, neither the petitioner, respondent nor any of the parties' children have lived in the State of New Hampshire . . . The petitioner has been a resident of the Commonwealth of Virginia since December 21, 2000. Peter Paul Mitrano (age 14) and Christopher Louis Mitrano (age 9) have been residents of the Commonwealth of Virginia since December 21, 2000 until they were taken away today, January 8, 2001, by the respondent. Accordingly, because there is and has been no contestant nor child living in the State of New Hampshire since the end of the day of December 20, 2000, the State of New Hampshire does not have jurisdiction to even consider making a modification of the existing custody Order of the Circuit Court of Fairfax County, Virginia for said children pursuant to Title 28 of the United States Code, Section 1738A . . . *Arguendo*, even if the State of New Hampshire were to have jurisdiction to modify the attached permanent

> custody Order of the Circuit Court of Fairfax County, Virginia, any orders from the State of New Hampshire that are ex parte orders wherein no notice whatsoever was given to petitioner (including petitioner's attorney located in the State of New Hampshire) nor where no opportunity to be heard was given petitioner are unenforceable outside the State of New Hampshire pursuant to Title 28 of the United States Code, Section 1738A." (Bold emphasis added.)

The above clearly establishes that the father has stated a cause of action because (1) there exists the valid custody order (from the Commonwealth of Virginia dated 1992); (2) Title 28 of the United States Code, Section 1738A provides that the trial court was required to enforce said valid custody order from the Commonwealth of Virginia; and (3) the mother and children were located in the State of Vermont at time the father's petition was filed.

Procedurally, on January 9, 2001, the Emergency Petition for Enforcement of a Custody Order was filed at the trial court. (A-18) The trial dismissed the said Emergency Petition for Enforcement of a Custody Order on January 23, 2001. (A-10) Thereafter, the petitioner timely filed a notice of appeal on February 12, 2001. The Entry Order of the Supreme Court of the State of Vermont was entered on August 29, 2001. (A-1) This petition for writ of certiorari was filed within ninety days of said date of August 29, 2001.

Argument

1. Should the State of Vermont be required to enforce a child custody order (from the Commonwealth of Virginia dated 1992) pursuant to Title 28, United States Code, Section 1738A?

In summary, the important points in this case are that (1) the Commonwealth of Virginia issued a custody order in compliance with Title 28, United States Code, Section 1738A on September 4, 1992; (2) on January 9, 2001, the father filed in the State of Vermont an enforcement action of said custody order from the Commonwealth of Virginia; (3) Title 28, United States Code, Section 1738A states that the trial court in the State of Vermont **"shall enforce"** said custody order from the Commonwealth of Virginia; (4) any orders from the State of New Hampshire are void and in violation of the federal law (Title 28, United States Code, Section 1738A) in that the State of New Hampshire orders were issued ex parte and/or without subject matter jurisdiction.

The Supreme Court of the State of Vermont committed error in its decision that the father failed to state a claim upon which relief may be granted. The Supreme Court of the State of Vermont relied upon allegations outside of the four corners of the Emergency Petition for Enforcement of a Custody Order. The standard of review is *de novo*.

Title 28, United States Code, Section 1738A does not require the State of Vermont to be a

"home State" to enforce the custody order from the Commonwealth of Virginia. In fact, the words **"shall enforce"** are mandatory words as opposed to "may-like" permissive language.

Title 28, United States Code, Section 1738A states in pertinent part that:

> "(a) **The appropriate authorities of every State shall enforce according to its terms**, and shall not modify except as provided in subsections (f), (g), and (h) of this section, any custody determination or visitation determination made consistently with the provisions of this section by a court of another State." (Bold emphasis added.)

Pursuant to said above-quoted language of Title 28, United States Code, Section 1738A, the father is respectfully requesting that this Court remand this matter to the Supreme Court of the State of Vermont with instructions to remand this matter to the trial court for a decision on the merits with instructions to enforce the custody order of the Circuit Court of Fairfax County, Virginia attached to the father's emergency petition for enforcement. The petitioner contends that the standard of review is *de novo*.

There is no dispute by and through the custody order of the Circuit Court of Fairfax County, Virginia, that the Commonwealth of Virginia "made a child custody or visitation determination" consistent "with the provisions of" Title 28 of the United States Code, Section 1738A.

Section 20-108 of the Code of Virginia provides that the Commonwealth of Virginia shall continue to have jurisdiction over the custody order of the Circuit Court of Fairfax County, Virginia. The father currently is a resident of the Commonwealth of Virginia. The children's paternal grandparents, who are contestants, have been residents of the Commonwealth of Virginia since 1972. The Commonwealth of Virginia has continuing jurisdiction pursuant to Title 28 of the United States Code, Sections 1738A(c)(2)(E) and 1738A(d). Title 28 of the United States Code, Section 1738A(d) states that:

> "(d) The jurisdiction of a court of a State which has made a child custody or visitation determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant."

In *Thompson v. Thompson*, 484 U.S. 174 (1988) this Court ruled that Title 28 of the United States Code, Sections 1738A is only a full faith and credit statute and does not create a federal right of action.

Also see Meade v. Meade, 650 F.Supp. 205, 210 (N.C. 1986), *affirmed* 812 F.2d 1473 (4th Cir. 1987), which was decided prior to *Thompson v. Thompson, supra* wherein the court stated in part that:

". . . Thus North Carolina is under a federal duty to enforce the decree according to its terms and acted improperly in modifying Virginia's initial decree.

"In further support of the conclusion that North Carolina lacks modification jurisdiction under the PKPA, the court holds that Virginia's September 3, 1985, decree modifying its initial award is consistent with Section 1738A and that order is entitled to enforcement by North Carolina as required by 28 U.S.C. § 1738A(a). Virginia, as the court granting the initial decree, has continuing jurisdiction under subsection (d) of the PKPA. See 28 U.S.C. § 1738A(c)(2)(E). The so-called continuing jurisdiction provision provides as follows:

> The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

> 28 U.S.C. § 1738A(d). This provision imposes three requirements for the existence of continuing jurisdiction in Virginia: (1) a valid initial custody decree; (2) the present existence of jurisdiction under the laws of Virginia; and (3) **the current residence of one of the contestants or the child in Virginia**. Cf. DiRuggiero v. Rodgers, 743 F.2d 1009, 1016 (3d Cir.1984) . . . ." (Bold emphasis added.)

The Commonwealth of Virginia clearly had jurisdiction pursuant to Title 28, United States Code, Section 1738A at the time the custody order that is attached to the father's emergency petition for enforcement was issued. The father therefore contends that the Commonwealth of Virginia had and has continuing jurisdiction based upon the father's residence in the Commonwealth of Virginia and/or the paternal grandparents' residence in the Commonwealth of Virginia. See the discussions about the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA) contained in 32 Family Law Quarterly 267, 342 (1998), wherein it is stated with reference to said Uniform Child-Custody Jurisdiction and Enforcement Act "that a remaining grandparent . . . should not suffice to confer exclusive, continuing jurisdiction". Contrary to said Uniform Child-Custody Jurisdiction and Enforcement Act, Title 28, United States Code, Section 1738A clearly

provides that a remaining grandparent does in fact suffice to confer exclusive, continuing jurisdiction.

Arguendo, the State of Vermont is not even required to be a "home State" to only enforce an existing custody order that issued in accordance with the requirements of Title 28, United States Code, Section 1738A. *See Dyer v. Surratt*, 466 S.E.2d 584, 587 (Ga. 1996) ("judgment that has not been modified by a court of another State with jurisdiction to do so may hear a Georgia-resident").

Moreover, the State of New Hampshire was not a "home State" on the dates that the mother filed the petitions to modify the custody order from the Commonwealth of Virginia because the children had been living in the State of Vermont part of the time with the mother prior to the filing of the petitions. In *Neger v. Neger*, 459 A.2d 628, 637-638 (N.J. 1983), the court stated:

> "As noted previously, the plaintiff and defendant had arranged for alternating physical custody of Carly . . . This record does not satisfy the statutory six-consecutive-month requirement. Carly had not lived with her father in California for six consecutive months 'within six months before commencement of the proceeding' involving custody in the California court . . . A contention that Carly's absence from New Jersey was temporary and therefore should not be counted as part of a six-month

> period assumes that residing with her father was only a visit. **However, the arrangement here was not truly characteristic of a visit, but consisted of fixed substantial periods of time in a regular alternating manner unrelated to holidays or vacations. It is possible, of course, that there may be no home state.** *See, e.g., In re the Marriage of Hubbard*, 315 N.W.2d 75 (Iowa 1982) (after Iowa divorce in 1976 in which mother was awarded custody of three children, mother and children moved so frequently before custody modification instituted in Iowa in 1979, that there was no 'home state')." (Bold emphasis added.)

Also see Johnson v. Johnson, 26 Va. App. 135, 149, 493 S.E.2d 668, 675 (1997), wherein this Court stated:

> "In the instant case, during the time immediately preceding both the divorce decree and the consent decree of December 1993, the child spent short periods alternatively with each parent, resulting in an equal division of her time between Virginia and New York. **At that time, the child had no single home state under the UCCJA definition** . . . ." (Bold emphasis added.)

In *St. Andrie v. St. Andrie*, 473 So.2d 140, 144 (La. 1985), the court also found that the child had no home state when the child lived in two different states pursuant to the agreement of the parents, the court explained the situation and stated:

> "Analyzing the situation before the court under the 'home state' standard, during the six-month period prior to the institution of the custody proceeding . . . the child was in fact shuttled back and forth between Georgia and Louisiana every few months. Therefore, **it is clear that the child has no 'home state'**." (Bold emphasis added.)

Also see 45 Hastings L.J. 1329, 1344 (July 1994) wherein it is noted that "A child in a joint custody situation might have two established homes."

The court ruled in *State Ex Rel. Conforti v. Wilson*, 203 W.Va. 21, 25, 506 S.E.2d 58, 62 (1998) that "[n]aturally, **as a federal jurisdictional statute**, the PKPA preempts the UCCJA by virtue of the Supremacy Clause. (Citation omitted)" (Bold emphasis added.) *Also see Shute v. Shute*, 158 Vt. 242, 247, 607 A.2d 890, 893 (1992), wherein the court ruled that the PKPA preempts the UCCJA and/or the state statutes whenever there is a conflict between the same as to which state has subject matter jurisdiction concerning child custody.

Because the State of New Hampshire was not a "home State" on the dates the petitions were

filed by the mother, the interpretation of the following language contained in Title 28 of the United States Code, Section 1738A(c)(2)(A) is critical:

> "(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, **or** (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, **and a contestant continues to live in such State;**" (Bold emphasis added.)

Note that in interpreting the language **"and a contestant continues to live in such State"**, this Court must also consider the statute as a whole. Note that the language is different than the words "on the date of the commencement of the proceeding" that are in the beginning of above-quoted language of Title 28 of the United States Code, Section 1738A(c)(2)(A). Also note the difference in words contained in Title 28 of the United States Code, Section 1738A(d) that "such State remains the residence of the child or of any contestant". Thus in interpreting the language **"and a contestant continues to live in such State"**, this Court should find that the plain language of said words means that the State of New Hampshire no longer had jurisdiction when all the contestants stopped living in the State of

New Hampshire. In the *Matter of Guardianship of Walling*, 727 P.2d 586, 590 (Okl. 1986), the court discussed the language stated above and stated:

> "Paragraph 1.a also does not apply because the children were not in the state at the time the commencement of the proceeding. Furthermore, paragraph 1.b is not applicable **because of the requirement of having a 'person acting as parent' continued to live in the state** . . . ." (Bold emphasis added.)

Note that in discussions about the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA) contained in 32 Family Law Quarterly 267, 343 (1998), it is stated with reference to said Uniform Child-Custody Jurisdiction and Enforcement Act that:

> "If State A had jurisdiction under this Section [UCCJEA] at the time a modification proceeding was commenced there, it would not be lost by all parties moving out of the state prior to the conclusion of proceeding . . . ."

In comparison, the language of Title 28 of the United States Code, Section 1738A provides that jurisdiction is lost by all parties moving out of the state prior to the conclusion of the proceedings under Title 28 of the United States Code, Section 1738A(c)(2)(A)(ii).

Accordingly, any orders issued by the State of New Hampshire after December 20, 2000 would be void for lack of subject matter jurisdiction pursuant to Title 28 of the United States Code, Section 1738A. *Also see Badwell v. Brooks*, 686 A.2d 1179, 1182 (N.H. 1996) ("court's jurisdiction to award custody is purely statutory").

Note also that Title 28 of the United States Code, Section 1738A(c)(2)(B) does not apply because the Commonwealth of Virginia had prior jurisdiction under Title 28 of the United States Code, Section 1738A(c)(2)(A). *Also see* 32 Family Law Quarterly 267, 278 (1998), wherein it is stated:

> "In contrast, the PKPA seeks to limit the exercise of **initial custody jurisdiction** to the home state, if there is one. It does this **by prioritizing home state jurisdiction over significant connection jurisdiction**. [Footnote: 28 U.S.C. § 1738A(c)(2)(A) and (B).]" (Bold emphasis added.)

In *Harris v. Simmons*, 676 A.2d 944, 949-950 (Md. 1996), reconsideration denied, certiorari denied 684 A.2d 454, the court stated:

> "The UCCJA must be read in conjunction with the federal Parental Kidnapping Prevention Act ('PKPA'). [Footnote omitted.] **This Court has held that when a child has a home**

> **state, the PKPA 'forbids the use of significant connections as the basis for jurisdiction in child custody litigation.'** (Citations omitted.)" (Bold emphasis added.)

Also note that in the case of *In re Marriage of Leyda*, 398 N.W.2d 815, 819 (Iowa 1987), the court stated:

> ". . . The provisions of this federal legislation indicate a congressional intent that the act be applied in all interstate custody disputes. State courts considering the question have held the federal legislation preempts state law in determining when jurisdiction may be exercised in interstate custody matters. (Citations omitted.) **The federal statute uses language more specific than the UCCJA in limiting modification jurisdiction** . . . ." (Bold emphasis added.)

Another case discussing this issue is *Clarke v. Clarke*, 496 A.2d 361, 363 (N.H. 1985), wherein the court stated:

> "Critical to our analysis of the issue of jurisdiction presented here is the recognition that this case involves modification of an existing custody order and not formulation of an initial decree. (Citations omitted.) Under the Uniform Child Custody

> Jurisdiction Act (UCCJA), which New Hampshire adopted in 1979 as RSA chapter 458-A, initial jurisdiction and modification jurisdiction are governed by different standards. 'Initial jurisdiction is primarily in the home state of the child,' while '[j]urisdiction to modify an existing custody decree is reserved for the state that rendered the decree.' (Citations omitted.)"

The interpretation of Title 28 of the United States Code, Section 1738A is a question of law.

Furthermore, in *Rocissono v. Spykes*, Vt. , 749 A.2d 592, 599 (2000), the court stated that there was "case law precluding courts from bootstrapping emergency jurisdiction into jurisdiction to make permanent custody determinations. (Citation omitted.)"

The State of New Hampshire clearly did not have subject matter jurisdiction to modify the custody order from the Commonwealth of Virginia. In *Via v. Johnston*, 521 So.2d 1324, 1326 (Ala. 1987), the court stated:

> ". . . However, we have held in *Mitchell, supra*, that the PKPA does not recognize an emergency as granting modification authority; rather, it expressly states that a sister state's judgment can only be modified as is provided in § 1738A(f), *supra*. *Mitchell*, however, goes on to say that neither the best interest rule nor the emergency rules as to custody were abolished by the PKPA.

> Congress, however, established the proper forum for the determination of such issues in modification proceedings . . . ."

The language of Title 28, United States Code, Section 1738A provides clearly that under the facts of this case that the trial court must enforce the custody order from the Commonwealth of Virginia. In *Eichelberger v. Eichelberger*, 2 Va.App. 409, 412, 345 S.E.2d 10, 12 (1986), this Court ruled:

> "Once a court has ruled on matters relating to the custody and care of minor children, and visitation rights of the noncustodial parent, the court retains jurisdiction throughout the minority status of the child involved. Andrews v. Geyer, 200 Va. 107, 104 S.E.2d 747, 751 (1958) . . . ."

It is important to note that the mother has wrongfully failed to return the two boys to the father after her scheduled visitation ended on Monday, January 8, 2001. The father has not seen any of his three children since January 5, 2001. As the court stated in *Johnson v. Johnson*, 26 Va. App. 135, 146, 149, 493 S.E.2d 668, 673, 674 (1997):

> "A party must obey an existing custody order until a modification order supersedes it. '[T]he custody decree is conclusive as to all issues of

> law and fact decided and as to the custody determination made unless and until that determination is modified pursuant to law.' Code § 20-135.
>
> . . .
>
> ". . . Here mother violated a custody agreement by wrongfully retaining her child after her period of physical custody concluded. In both cases, **the violating parent gained a 'tactical advantage by his conduct.'"** (Citation omitted.) (Bold emphasis added.)

Arguendo, even if New Hampshire had jurisdiction under Title 28 of the United States Code, Section 1738A (which the father steadfastly denies), the ex parte New Hampshire order dated January 3, 2001 that dealt with the other children of the parties would be void because no notice whatsoever was given as required under Title 28 of the United States Code, Section 1738A. Title 28 of the United States Code, Section 1738A(e) states:

> "(e) Before a child custody or visitation determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any

> person who has physical custody of a child."

In addition, there was no contact made by the State of New Hampshire to the Commonwealth of Virginia prior to the entry of any orders that the State of New Hampshire has made to date. *See Ex Parte Raywood*, 549 So.2d 103, 104 (Ala. 1989) wherein the court stated: "we find that the Louisiana ex parte order was not made consistently with the PKPA and is not entitled to full faith and credit by the courts of Alabama"; also *see Joel M. v. Karen M.*, 507 N.Y.S.2d 369, 371 (1986) wherein the court stated:

> "The sole issue presented in this enforcement proceeding is whether or not the Superior Court of the State of New Hampshire in making the ex parte temporary order of custody was exercising jurisdiction substantially in conformity with the PKPA and UCCJA. Because neither the respondent-mother nor the respondent-maternal grandmother who has physical custody of the children were afforded any notice whatsoever--much less an opportunity to be heard, this Court holds and determines that the New Hampshire ex parte order dated October 2, 1986 is not entitled to full faith and credit under the PKPA or the UCCJA. (See *Sherry Ann F. v. Bennet S.*, 131 Misc.2d 854, 502

N.Y.S.2d 383 (Fam.Ct., Scho.Co., 1986))."

Accordingly, because it is clear that the ex parte New Hampshire order dated January 3, 2001 is not entitled to full faith and credit under Title 28 of the United States Code, Section 1738A (even if New Hampshire had jurisdiction under Title 28 of the United States Code, Section 1738A which the father steadfastly denies), the mother wrongfully failed to return the two boys after her scheduled visitation to the father on Monday, January 8, 2001.

Immediately thereafter, on January 9, 2001, the father filed his Emergency Petition for Enforcement of a Custody Order before the trial court. Because the ex parte New Hampshire order dated January 3, 2001 is not entitled to full faith and credit under Title 28 of the United States Code, Section 1738A, the trial court erred in ruling that said New Hampshire order dated January 3, 2001 should be followed. It is clear that the federal law applies in this matter.

In this action, the father is only attempting to enforce the custody order and not modify or change the terms of the custody order that is attached to the father's emergency petition for enforcement of the subject custody order. Moreover, it is not necessary for the State of Vermont to be a "home State" to enforce the custody order that is attached to the father's emergency petition for enforcement of the subject custody order. Therefore, any assertions that the trial court and/or any other court may not proceed with an enforcement action (as opposed

to a "proceeding for a custody or visitation determination") are clearly without merit. *See* Title 28, United States Code, Section 1738A.

Note that in *Mebert v. Mebert*, 444 N.Y.S.2d 834, 837 (1981), the court emphasized that the jurisdictional requirements must be met:

> "It is true that even though the Supreme Court had both the personal jurisdiction necessary to enter a decree of divorce, it may have lacked the subject matter jurisdiction necessary to make a custody determination. (Citation omitted.)
>
> . . .
>
> ". . . From its plain meaning of the statute (Citations omitted) **this court must conclude that under the federal law the best interest of the child can not be looked at in a custody matter unless the jurisdictional prerequisites set forth in the federal statute are met**, including the requirement that the child 'immediately preceding the time involved' must have lived in this state with one of its parents for at least six consecutive months. (Citation omitted.) (Bold emphasis added.)

Another reason not to recognize the New Hampshire orders are that said orders are the result of sham proceedings in that the very least

there is a willful failure of the Lebanon Family Division to follow the controlling law.[3] The Lebanon Family Division in the State of New Hampshire refuses to recognize the father's right to basic due process under the constitutions of the United States of America and the State of New Hampshire. The state court in New Hampshire is the legal equivalent of a bottomless black hell hole wherein said court has (1) taken away petitioner's children all initially on an ex parte basis; (2) unlawfully held the petitioner in contempt of court; (3) refused to allow the petitioner to call any witnesses to the stand at an alleged hearing in April 2001; (4) refused to allow the petitioner to conduct any cross-examination

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3. The father appropriately disciplined his daughter for being disrespectful by spanking her on her bottom with his hand. The father has done nothing wrong and is being denied his lawful right to custody; said spanking is being used as a pretext to deny the father his lawful custody of his children. Also note that although the father moved to the Commonwealth of Virginia and the Lebanon Family Division Court in the State of New Hampshire ruled that the father is in contempt of court for moving; the father was not required to give notice and was not required to obtain the consent of the mother prior to moving to the State that issued the initial custody order. Moreover, the custody order of the Circuit Court of Fairfax County, Virginia attached to the father's emergency petition for enforcement of the subject custody order filed before the trial court, states that the "minor children of the parties shall reside primarily with Peter". The petitioner, Peter Paul Mitrano, has a constitutional right and freedom to travel; he and his children are not wards of the State of New Hampshire.

at an alleged hearing in April 2001; and, (5) refused to issue a decision while ordering that the petitioner is not allowed any visitation whatsoever with his children. Moreover, despite the petitioner's request for aid from the Supreme Court of the State of New Hampshire, the Supreme Court of the State of New Hampshire refused to provide any assistance

The courts in the State of Vermont clearly committed error in refusing to enforce the subject custody order; clearly, the State of Vermont had and has jurisdiction to make a ruling as to whether or not to enforce the subject custody order when all the parties were physically present in the State of Vermont. The father has clearly been denied his lawful custody of his children even though the father has done nothing wrong. The father is not a "potted plant" who is required to sit in the State of New Hampshire while the State of New Hampshire violates the federal laws of the United States of America along with the father's rights and liberties. The father has not been permitted to even see his children since January 5, 2001.

In closing, the father respectfully reminds this Court that the father has rights to raise his children free of unreasonable interference. In *Collins v. Collins*, 183 Va. 408, 412-413, 32 S.E.2d 657, 658 (1945), the court stated:

> "In Surber v. Bridges, 159 Va. 329, 334, 165 S.E. 508, 509, a case involving the custody of infant children, we said: 'In cases of this kind we have said that the welfare of

> the child is the paramount consideration. * * * This statement, so often made, is not unqualifiedly true. **Parents, too, have rights which must be safeguarded."** (Bold emphasis added.)

2. Should the Supreme Court of the State of Vermont be allowed to access attorney's fees related to the trial court against the petitioner for a reason raised for the first time before the Supreme Court of the State of Vermont in view of the common law American rule that each party shall pay their own attorney's fees?

The mother has failed to state why the trial court committed error in its decision denying her attorney's fees. The mother argued for the first time on appeal before the Supreme Court of the State of Vermont that the mother was entitled to attorney's fees on the basis of the principles expounded by Robin Hood (rob from the rich and give to the poor). These were new arguments being raised on appeal for the first time and hence should not even have been considered. The mother's newly-raised-on-appeal-for-the-first-time-Robin-Hood-mentality argument that the father should pay the mother's legal fees is frivolous.

3. Should the Supreme Court of the State of Vermont have ruled on the Motion to Strike filed by the petitioner?

The Supreme Court of the State of Vermont refused to make a ruling on the Motion to Strike filed by the petitioner. The petitioner contends that Supreme Court of the State of Vermont should have ruled on said Motion to Strike especially because the ruling by the Supreme Court of the State of Vermont relies upon facts not stated in his Emergency Petition for Enforcement of a Custody Order.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of the State of Vermont.

Respectfully submitted,

Peter Paul Mitrano
Pro se[4]
4912 Oakcrest Drive
Fairfax, Virginia 22030
(703) 591-7250

Petitioner

Dated: November 2001.

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4. The petitioner, Peter Paul Mitrano, is a member of the Bar of this Court and other courts.

Supreme Court of the State of Vermont

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

VT. SUPREME COURT
FILED IN CLERK'S OFFICE

AUG 29 2001.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-099

AUGUST TERM, 2001

Peter P. Mitrano	}	APPEALED FROM
	}	
v.	}	Windsor Family Court
	}	
Virginia L. Kelly	}	
	}	DOCKET NO. 9-1 -01 Wrdm
		Trial Judge: Paul F. Hudson

In the above-entitled cause, the Clerk will enter:

Father Peter Mitrano appeals from the family court's dismissal of his action seeking to enforce a custody decree from the State of Virginia under the Parental Kidnapping Prevention Act, 28, U.S.C § 1738A(a). Mother Virginia Kelly cross-appeals, arguing the trial court erred by not awarding attorney's fees and costs. We affirm.

The following facts in the record are not disputed by father. He and mother were married and had three children together. They were divorced by an order of a Virginia court in September 1992, which granted the parties joint physical and legal custody. Both parties moved to Hanover, New Hampshire in 1993 and resided in the same household there until October 2000, not as husband and wife, however.

As father catalogued in a "notice of related matters" filed with the trial court, mother filed an emergency petition seeking custody of the parties' three children in a New Hampshire court on October 16, 2000. Mother was living in Vermont at the time she filed the petition and had been since October 6. The court granted the emergency petition with respect to the parties' daughter. Following a contested hearing on the matter in December, the court continued the temporary order with respect to the daughter, indicating it would schedule a final hearing on mother's petition.

At the end of December, father moved to Virginia with the parties' two sons without notifying mother. Mother then sought an ex parte order from the New Hampshire court granting her temporary custody of the boys, which the court granted on January 3, 2001. Mother sought enforcement of the New Hampshire order in Virginia. Initially the Virginia court issued an order on January 4 prohibiting either party from removing the children from Virginia. The next day, the court entered an order stating that father should obey the New Hampshire order. As father concedes in his notice of related matters, the Virginia courts thereafter declined to exercise jurisdiction over the matter in response to two of father's petitions to enforce the original 1992 divorce order, deferring to the New Hampshire court. On January 10, father sought relief in the New Hampshire Supreme Court, seeking to stay the orders of the trial court and enjoin further action. The status of that action is unclear.

While the New Hampshire proceedings were pending and simultaneous with the petitions for enforcement he filed in Virginia, father also sought relief in Vermont. On January 9, he filed an enforcement action in Vermont family court under 28 U.S.C. § 1738A(a) (providing for full faith and credit for custody decrees of other states), again seeking to enforce the parties' original 1992 divorce decree. Mother filed a motion to dismiss and sought attorney's fees.

The court granted the motion to dismiss, determining that New Hampshire was properly exercising jurisdiction under the PKPA, and that the Virginia order had been superceded by the proceedings in New Hampshire. The court determined, however, that mother was not entitled to attorney's fees under 15 V.S.A. § 1043, which governs actions brought to enforce foreign custody decrees. Father appeals and mother cross appeals.

Father argues that the trial court improperly determined that his complaint failed to state a claim upon which relief may be granted under V.R.C.P. 12(b)(6), pointing out that we must assume all of the factual allegations in his complaint are true and confine ourselves to the "four comers" of his complaint in our review. Father ignores, however, the trial court's more important determination that New Hampshire was properly exercising jurisdiction over the question of custody of the parties' children at the time he sought relief in the Vermont court. This creates a more fundamental jurisdictional problem under the PKPA. Subsection (g) of the PKPA states:

> A court of a State shall not exercise jurisdiction in any proceeding for a custody or visitation determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to

> make a custody or visitation determination.

28 U.S.C. § 1738A(g). If New Hampshire was properly exercising jurisdiction under the PKPA, the pendency of the action there would prevent Vermont from exercising jurisdiction under the statute.

Father argues, however, that the New Hampshire court was not exercising jurisdiction consistent with the PKPA because he moved to Virginia with the parties' sons on December 20, and because mother had moved to Vermont on October 6, the parties' daughter joining her following the October 16 order. He concludes that these events deprived New Hampshire of "home state" status. This argument is without merit. The PKPA provides that a state makes a custody determination consistent with the PKPA if it has jurisdiction under its own laws and "such State ... is the home State of the child on the date of the commencement of the proceeding." 28 U.S.C. 1738A(c)(1) & (2)(A) (emphasis added); see also Rocissono v. Spykes, 170 Vt. 309, 313 (2000) (PKPA's jurisdictional criteria generally should be considered with respect to circumstances existing at the time the custody proceeding is initiated). "Home state" is defined as "the State in which, immediately preceding the time involved, the child lived with his parents [or] a parent ... for at least six months." 28 U.S.C. § 1738A(b)(4). The parties and their children had been living in New Hampshire for the seven years prior to the court assuming jurisdiction on October 16, 2000, when

the modification proceeding was commenced by mother's petition.' Furthermore, father stated in his filing before the trial court that Virginia - the state issuing the original custody decree - had declined jurisdiction in favor of New Hampshire. See 28 U.S.C. § 1738A(f) (allowing modification of a custody decree from another state if the state has declined to exercise jurisdiction over modification). Therefore, the trial court properly determined that the New Hampshire court was exercising jurisdiction consistent with the PKPA.

Nevertheless, father also argues that an enforcement action is not a "custody determination" as used in the PKPA, therefore the statute does not prevent the Vermont court from exercising jurisdiction. The PKPA defines "custody determinati on" as any order, temporary or permanent that provides for the custody of a child. 28 U.S.C. § 1738A(b)(3). Furthermore, "physical custody" is defined as "actual possession and control of a child," 28 U.S.C. § 1738A(b)(7), which is exactly what father seeks through his enforcement action. Because another proceeding regarding the custody of the parties' children was pending in New Hampshire, which was exercising jurisdiction consistently with the PKPA, the trial court properly dismissed father's action seeking physical custody of the parties' children via enforcement of the parties' original Virginia divorce decree.' But see Matthews v. Rilgy, 162 Vt. 401, 408 n.9 (1994) (noting in dicta that, "[s]trictly speaking," UCCJA does not apply to contempt proceedings, even to enforce a custody decree, therefore court was not obligated

to contact court of other state that had modified original custody decree which father was seeking to enforce).

With regard to mother's cross-appeal, the trial court determined that it did not have power to award attorney's fees under 15 V.S.A. § 1043(b). Mother had sought attorney's fees and costs under the section, which provides "[a] person violating a custody decree of another state which makes it necessary to enforce the decree in this state may be required to pay necessary travel and other expenses, including attorneys' fees, incurred by the party entitled to the custody or his witnesses." 15 V.S.A. § 1043(b). The court determined that this section was limited to the party enforcing a decree, not a party defending against an enforcement action.

On appeal, mother argues that the trial court could have alternately awarded attorney's fees under its inherent authority to do so in divorce proceedings, citing Smith v. Stewart, 165 Vt. 364 (1996) and Harris v. Harris, 168 Vt. 13 (1998). We agree and remand for a determination of attorneys fees.

Affirmed, except for the issue of attorney's fees, which order of denial is reversed and remanded.

[1] The fact that mother moved to Vermont on October 6, and the fact that the children visited with her the two weekends preceding

October 16 does not change the "home state" status of New Hampshire at the time mother filed her petition seeking to modify custody. 28 U.S.C. § 1738A(b)(4) (providing that temporary absences by the children from their home state are counted as part of the six-month period that qualifies a state as such).

[2] In light of our disposition, we need not address father's argument that "home state" jurisdiction is not necessary for the family court to entertain an enforcement action. We have previously noted, however, "requiring UCCJA jurisdiction as a predicate to enforcement would defeat the purpose of the PKPA, which mandates that all states must enforce custody determinations made consistent with PKPA requirements, regardless of whether they could exercise jurisdiction to make a custody determination." Matthews v. Rilgy, 162 Vt. 401, 414 (1994). Furthermore, because we base our decision strictly on information in father's brief and in the trial court record, we will deny father's motion to strike portions of mother's brief and supplemental printed case.

BY THE COURT:

_____/s/_____
James L. Morse, Associate Justice

_____/s/_____
Denise R. Johnson, Associate Justice

_____/s/_____
Marilyn S. Skoglund, Associate Justice

ENTRY ORDER

VERMONT SUPREME COURT DOCKET NO. 2001-099

AUGUST TERM, 2001

PETER P. MITRANO*	}	APPEALED FROM
	}	Windsor Family
v.	}	
	}	DOCKET NUMBER.
VIRGINIA L. KELLY**	}	9-1-01 Wrdm
	}	

In the above-entitled cause, the Clerk will enter:

A decision having issued in the above appeal, appellant's motion to supplement the record on appeal is denied as moot.

[ ] Publish

[x] Do Not Publish

FOR THE COURT:

_____/s/_____
James L. Morse, Associate Justice

Filed by Clerk: Jan 23, 2001

STATE OF VERMONT
WINDSOR COUNTY, SS.

PETER PAUL MITRANO, Petitioner :
:
v. :
:
VIRGINIA LEE KELLY, Respondent :

VERMONT FAMILY COURT

WINDSOR COUNTY

DOCKET NO. F9- 1 -01 Wrdmd

DECISION RE: MOTION TO DISMISS AND FOR ATTORNEY'S FEES

On January 9, 2001, Petitioner Peter Paul Mitrano filed an "Emergency Petition for Enforcement of the Attached Custody Order." He seeks to enforce an Order of joint custody over the parties' three minor children, issued on September 4, 1992, by Circuit Court of Fairfax County, Virginia. (Chancery Nos. 123690 and 124672).

On January 11, 2001, Respondent Virginia Lee Kelly filed a Motion to Dismiss and for Attorney's Fees. Respondent's motion explains that more recently the parties have litigated

custody issues in the Family Court in Lebanon, New Hampshire. (No. 2000-M-193). Although the procedural history is not entirely clear, it appears that (1) petitions were filed in New Hampshire during October of 2000, (2) at that time the parties lived in New Hampshire, where they had lived for approximately seven years, (3) Judge Cyr of the New Hampshire court issued an ex parte order on October 16, 2000, granting temporary custody of one of the children to Ms. Kelly, (4) Judge Martin of the New Hampshire court held a hearing on December 14, 2000, to address issues of custody, and (5) Judge Martin of the New Hampshire court issued a decision on December 28,2000, granting temporary custody of the children to Ms. Kelly. Based on this additional information, respondent requests this court to dismiss the petition, because the Virginia Order has been superseded.

Petitioner does not deny that the New Hampshire Family Court has issued orders addressing custody. Instead, he argues that the New Hampshire orders are not entitled to full faith and credit because of failure to comply with the PKPA, 28 U. S.C. § 1738A. Petitioner stresses that respondent and the children are now living in Norwich, Vermont, and that all of the parties ceased residing in the State of New Hampshire by December 20, 2000. According to petitioner's argument, New Hampshire is thereby deprived of PKPA jurisdiction, under § 173 8A(c)(2)(A)(ii).

However, this court disagrees with petitioner's interpretation of the PKPA. "Home State" is defined as follows:

> § 1738A(b)(4). "Home State" means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, ... Periods of temporary absence of any of such persons are counted as part of the six-month period.

Based on the undisputed facts, the condition under § 1738A(c)(2)(A)(i) was met because New Hampshire was the "home state" on the date of the commencement of the proceedings. Contrary to petitioner's argument, New Hampshire was not deprived of PKPA jurisdiction merely because the parties left.

Petitioner is not entitled to enforcement of the Virginia Order, because it has been superseded by the New Hampshire Order. The court will dismiss the petition for failure to state a claim upon which relief may be granted.

Respondent also asks for attorney's fees under 15 V.S.A. § 1043. However, § 1043 applies to filing and enforcement of a custody decree of another state. Respondent has simply requested dismissal of the petition. Her motion is granted, but the court declines to award attorney's fees.

ORDER

Respondent's Motion to Dismiss is GRANTED. Respondent's Motion for Attorney's Fees is DENIED.

Dated this 23rd day of January, 2001.

_____/s/_____
Hon. Paul F. Hudson, Presiding Judge

Title 28, United States Code, Section 1738A, also known as the Parental Kidnapping Prevention Act or "PKPA"

§ 1738A. Full faith and credit given to child custody determinations

(a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsections (f), (g), and (h) of this section, any custody determination or visitation determination made consistently with the provisions of this section by a court of another State.

(b) As used in this section, the term-

(1) "child" means a person under the age of eighteen;

(2) "contestant" means a person, including a parent or grandparent, who claims a right to custody or visitation of a child; child and his parents, or the child and at least one

(3) "custody determination" means a judgment, decree, or other order of a court providing for the custody of a child, and includes permanent and temporary orders, and initial orders and modifications;

(4) "home State" means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting; is parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived

from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period;

(5) "modification" and "modify" refer to a custody or visitation determination which modifies, replaces, supersedes, or otherwise is made subsequent to, a prior custody or visitation determination concerning the same child, whether made by the same court or not;

(6) "person acting as a parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody;

(7) "Physical custody" means actual possession and control of a child;

(8) "State" means a State of the United States, the District of Columbia,

the Commonwealth of Puerto Rico, or a territory or possession of the

(9) "visitation determination" means a judgment, visitation of a child and includes permanent and temporary orders and initial orders and modification faith and credit in every court within the United

(c) A child custody or visitation determination made by a court of a State is consistent with the such State; and

(1) such court has jurisdiction under the law of such State; and

(2) one of the following conditions is met:

(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the

commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

(B) (i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

(C) the child is physically present in such State and (I) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse;

(D) (i) it appears that no other State would have jurisdiction under subparagraph (A), (B),(C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody or visitation of the child, and (ii) it is in the best interest of the child, that such court assume jurisdiction;

or

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

(d) The jurisdiction of a court of a State which has made a child custody or visitation determination consistently with the provisions of

this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

(e) Before a child custody or visitation determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of a child.

(f) A court of a State may modify a determination of the custody of the same child made by a court of another State, if—

(1) it has jurisdiction to make such a child custody determination; and

(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

(g) A court of a State shall not exercise jurisdiction in any proceeding for a custody or visitation determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody or visitation determination.

(h) A court of a State may not modify a visitation determination made by a court of another State unless the court of the other State no longer has jurisdiction to modify such determination or has declined to exercise jurisdiction to modify such determination.

IN THE STATE OF VERMONT
IN THE WINDSOR FAMILY COURT

PETER PAUL MITRANO,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No.: F9-1-01
	)	
VIRGINIA LEE KELLY (formally Mitrano),	)	
	)	
Respondent.	)	

EMERGENCY PETITION FOR ENFORCEMENT

COMES NOW, the petitioner, Peter Paul Mitrano, *pro se*, and states his Emergency Petition for Enforcement of the Attached Custody Order as follows:

1. The petitioner, Peter Paul Mitrano, is a resident of the County of Fairfax in the Commonwealth of Virginia. The petitioner, Peter Paul Mitrano, resides at 4912 Oakcrest Drive, Fairfax, Virginia 22030.

2. The respondent, Virginia Lee Kelly (who was formerly known as Virginia Lee Mitrano) is a resident of Norwich, Vermont. The respondent, Virginia Lee Kelly, resides at Newton Lane, Norwich, Vermont 05055. The respondent,

Virginia Lee Kelly, receives mail at the address of Post Office Box 1248, Norwich, Vermont 05055.

3. The petitioner, Peter Paul Mitrano, and the respondent, Virginia Lee Kelly were previously married and are now divorced. *See* Chancery Numbers 123690 and 124672 from the Circuit Court of Fairfax County, Virginia.

4. The petitioner, Peter Paul Mitrano, and the respondent, Virginia Lee Kelly Mitrano had three children during their marriage: Christina Lee Mitrano (now age 15), Peter Paul Mitrano (now age 14) and Christopher Louis Mitrano (now age 9).

5. On Thursday, January 4, 2001, the defendant, Virginia Lee Kelly Mitrano attempted to take Peter Paul Mitrano (age 14) and Christopher Louis Mitrano (age 9) out of school in Fairfax, Virginia to Vermont based upon an ex parte order from the State of New Hampshire. Later in the day on Thursday, January 4, 2001, the defendant, Virginia Lee Kelly Mitrano attempted to take Peter Paul Mitrano (age 14) and Christopher Louis Mitrano (age 9) from their home at 4912 Oakcrest Drive, Fairfax, Virginia. See the attached order from the State of New Hampshire. After the petitioner produced Peter Paul Mitrano (age 14) and Christopher Louis Mitrano (age 9) for visitation in Fairfax, Virginia, the respondent failed to return the children to petitioner in accordance with the attached custody Order of the Circuit Court of Fairfax County, Virginia. Said custody Order of the Circuit Court of Fairfax County, Virginia has also been registered in the State of New Hampshire, Judicial Branch, Family Division at Lebanon.

6. The petitioner denies that the State of New Hampshire has jurisdiction to determine custody of said children pursuant to Title 28 of the United States Code, Section 1738A. Petitioner further states that as of the end of the day of December 20, 2000, neither the petitioner, respondent nor any of the parties' children have lived in the State of New Hampshire. *See* Title 28 of the United States Code, Section 1738A. Petitioner further states that the respondent has been a resident of Town of Norwich in the State of Vermont since on or about October 1, 2000. Since October 6, 2000, the children have lived with the respondent in the State of Vermont from at least 6:00 P.M. on Friday, October 6, 2000 until school started at approximately 8:00 A.M. on Monday, October 9, 2000 and from 6:00 P.M. on Friday, October 13, 2000 until school started at approximately 8:00 A.M. on Monday, October 16, 2000. Accordingly, prior to the date of a filing of petition to modify a custody order in the State of New Hampshire which was October 16, 2000 and on October 16, 2000, the children were living in both the State of Vermont and the State of New Hampshire. The petitioner has been a resident of the Commonwealth of Virginia since December 21, 2000. Peter Paul Mitrano (age 14) and Christopher Louis Mitrano (age 9) have been residents of the Commonwealth of Virginia since December 21, 2000 until they were taken away today, January 8, 2001, by the respondent. Accordingly, because there is and has been no contestant nor child living in the State of New Hampshire since the end of the day of December 20, 2000, the State of New Hampshire does not

have jurisdiction to even consider making a modification of the existing custody Order of the Circuit Court of Fairfax County, Virginia for said children pursuant to Title 28 of the United States Code, Section 1738A. *Also see* the attached permanent custody Order of the Circuit Court of Fairfax County, Virginia from 1992 that has remained in effect since 1992. *Also see* Code of Virginia, Section 20-108 providing for continuing jurisdiction of the Circuit Court of Fairfax County, Virginia to change or modify said attached permanent custody Order of the Circuit Court of Fairfax County, Virginia. *Arguendo*, even if the State of New Hampshire were to have jurisdiction to modify the attached permanent custody Order of the Circuit Court of Fairfax County, Virginia, any orders from the State of New Hampshire that are ex parte orders wherein no notice whatsoever was given to petitioner (including petitioner's attorney located in the State of New Hampshire) nor where no opportunity to be heard was given petitioner are unenforceable outside the State of New Hampshire pursuant to Title 28 of the United States Code, Section 1738A.

7. Based upon information and belief, the children Christina Lee Mitrano (now age 15), Peter Paul Mitrano (now age 14) and Christopher Louis Mitrano (now age 9) are located at the home of the respondent, Virginia Lee Kelly at Newton Lane, Norwich, Vermont 05055

8. WHEREFORE the petitioner, Peter Paul Mitrano, *pro se*, respectfully requests that this Honorable Court enforce the attached permanent custody Order of the Circuit Court of Fairfax County, Virginia and further order that

the children of the parties: Christina Lee Mitrano (now age 15); Peter Paul Mitrano (now age 14); and, Christopher Louis Mitrano (now age 9) be immediately returned to the petitioner, Peter Paul Mitrano.

Respectfully requested,

Peter Paul Mitrano
Pro se
4912 Oakcrest Drive
Fairfax, Virginia 22030

(703) 591-7250

Petitioner

Dated: January 8, 2001.

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

PETER PAUL MITRANO

Plaintiff/Cross-Defendant

v. In Chancery No. 123690 124672

VIRGINIA LEE KELLY MITRANO

Defendant/Cross-Plaintiff

ORDER

THIS CAUSE came to be heard on the 6th day Of July 1992, upon the cross Motions of Plaintiff and Defendant for entry Of an order granting each of them sole custody of their minor children, and appropriate visitation to the other party. Both parties having been present in court with their counsel.

IT APPEARING TO THE COURT that there were three (3) children born of this marriage, to-wit: CHRISTINA LEE MITRANO, born on the 4th day of October 1985 (6 years); PETER PAUL MITRANO, born on the 27th day of December 1986 (5 years); and CHRISTOPHER LOUIS

MITRANO born on the 21st day of December 1991 (6 months); and

IT FURTHER APPEARING TO THE COURT after hearing testimony of the parties, their witnesses, and upon the argument of counsel, that the following is an appropriate order to be, entered in this cause, it is therefore

ORDERED that Plaintiff, Peter Paul Mitrano, (Peter), and Defendant, Virginia Lee Kelly Mitrano (Virginia), shall have joint physical and legal custody of their minor children, to-wit: CHRISTINA LEE MITRANO, PETER PAUL MITRANO and CHRISTOPHER LOUIS MITRANO, and it is further

ORDERED that the minor children of the parties shall reside primarily with Peter, and the minor children shall be with their mother on each Wednesday from 5:00 p.m. until 8:00 p.m., for dinner, and the first three weekends of each month beginning at 6:00 p.m. on the first Friday of each month continuing until Monday at 9:00 a.m., or when school begins, whichever is most appropriate under the circumstances, [the parties agree to re schedule in the event of changes to the schedule to their satisfaction] and it is further

ORDERED that in addition to the time set forth above, Peter and Virginia shall have the children with them the following times (these times shall supercede the times immediately set forth above in the event of a conflict):

(a) Christmas: Unless Peter takes the children on vacation during the Christmas holiday, which would be for a maximum of one weeks time, the minor children will spend the day of Christmas Eve, Christmas Eve and Christmas morning until 10:00 a.m. with Peter, and from 10:00 a.m. Christmas Day until 10:00 a.m. on New Years Day with Virginia. For the rest of the Christmas break, both before Christmas and after New Years, the minor children will be with Peter; except, the minor child, PETER PAUL MITRANO, shall celebrate his birthday with Peter on the actual day it falls.

(b) Easter and Thanksgiving: The minor children of the parties will be with Virginia on Easter weekend [& Spring Break, unless Peter takes the children on vacation and gives 30 days notice to Virginia of his intention to take the children for the vacation] and they will be with Peter on Thanksgiving and the three days following Thanksgiving.

(c) Mothers and Fathers Day: The minor children of the parties will be spend time with the appropriate parent on the appropriate parent's day.

(d) Birthdays: Two of the minor children of the parties, CHRISTINA LEE MITRANO and CHRISTOPHER LOUIS MITRANO, will celebrate their birthdays in whichever parents home they may be in on the specific date of their birthday. For all three children, the parent with whom they are not with at that particular time, will be invited

to participate in the birthday celebration. In addition, each parent will have the right to be with the children, for an appropriate period of time under the particular circumstances as they exist, on their own particular birthdays.

(e) Summer Vacation: The parties will add the number of days between the end of school and the beginning of the next school year and divide by 2; Virginia shall have the first half of the summer and Peter shall have the second half of the summer. So long as each of the parties remains in the Washington Metropolitan Area during their summer time with the children, the other patty shall have rights to reasonable time to spend with the minor children; and it is further

ORDERED that each party shall have equal access to medical records, consultations with physicians regarding the medical condition of the children, and school records of the minor children of the parties. In the event that either party shall obtain a document pertaining to the medical condition of the children, or school report cards, a copy of that document shall be provided to the other parent; and it is further

ORDERED that each of the parties shall consult with each other with regards to all major decisions made for the benefit of the children. In the event they are unable to agree, then they shall consult with Dr. Jeffrey Schulman, or some other agreed upon third person; and it is further

ORDERED that each of the parties shall participate in a seminar or course consisting primarily of receiving training in the art of mediation, and it is further

ORDERED that in the event the parties cannot reach a consensus on decisions regarding the welfare of the children, then the particular parties' area of responsibility for decision making' shall be as follows: Virginia shall have decision making powers in the areas of recreational and social activities, hobbies (all non-school related) and health. Peter shall have decision making powers in the areas of the minor children's' education and religious upbringing and training.

ENTERED this 4 day of September 1992.

_____/s/_____
ROSEMARIE ANNUNZIATA, JUDGE

Smolen & Plevy P.C.

_____/s/_____
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